To be argued by:
THOMAS A. HARNETT

United States Court of Appeals

FOR THE NINTH CIRCUIT.

Docket No. 17609

ALBIN STEVEDORE COMPANY,
a Washington Corp.,
Appellant,

v.

CENTRAL RIGGING & CONTRACTING CORPORATION,
Appellee.

On Appeal from the United States District Court
Western District of Washington : Northern Division

REPLY BRIEF FOR PLAINTIFF-APPELLANT.

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REPLY BRIEF FOR PLAINTIFF-APPELLANT.

Replying to Appellee's Arguments.

Except for the conclusory statement, of its position, Appellee's brief, in its entirety, neither disputes nor overcomes the basic point raised in and the authorities cited by the Appellant in its main brief, i.e., that the sole matter submitted to the arbitration was "the sum of $22,067.97 and each and every part thereof to the extent that said claim exceeds the sum of $6,000" [Tr. pp. 86, 87]. This is made manifest by the extensive argumentative approach employed by the Appellee throughout its brief.

The Appellee's brief concedes that its demand for arbitration, in fact its *amended* demand for arbitration, was solely with regard to the sum "in excess of $6,000". [Appellee's Brief, pp. 8, 9] Appellee's *amended* demand for arbitration, was that it:

> ". . . disputes and contests the claim of Albin Stevedore Company for the sum of $22,067.97, and each and every part thereof, to the extent that said claim exceeds the sum of $6,000 . . . and that there is no basis upon which Central Rigging & Contracting Corp. is liable for any sum in excess of $6,000; in addition, the amounts claimed by Albin Stevedore Company as such additional expenses are hereby disputed." [Tr. pp. 85-87, and set forth in Appellee's brief, pp. 8-9.]

Thereafter, in its brief, the Appellee continues to crystallize the Appellant's point when it quotes from Appellant's answering statement in the arbitration proceeding and italicizes the matter that the parties put into controversy in the arbitration proceeding, i.e., "Nevertheless this answering statement is submitted in order that the issues may be framed and *that the merits of this controversy may be finally determined.*" [Tr. p. 89 and Appellee's Brief, p. 9—emphasis is theirs; however, we place further emphasis on the words "this controversy".] The answering statement in the arbitration proceeding related and referred to "*this controversy*", i.e., the sum in excess of $6,000, as chosen by the Appellee in its amended demand for arbitration. Appellee recognizes our point when it proceeds to state that Appellant made a demand for payment forthwith of the $6,000 concededly due it. [See Appellee's Brief, p. 9; Tr. 89-90.]; there never was any dispute about it to be arbitrated.

However, thereafter in its brief, the Appellee endeavors to becloud the issues and skirt the question before this Court, by showing that at the arbitration hearing, Appellant attempted to prove the entire claim of $22,067.97, not merely the "extent said claim exceeds the sum of $6,000." Appellant, of necessity, had to prove all of the $22,067.97 in order to determine what was "in excess of $6,000." This is simple and basic arithmetic, i.e., the total must be proved in order to establish the extent of the excess over the first conceded item.

Moreover, the statement at page 13 of Appellee's brief that the arbitrators could make only "one award" is true and we concur in it. There could only be one award but that award, to be proper, may only be within the jurisdiction conferred upon the arbitrators in the controversy submitted to them by the Appellee's amended demand for arbitration, the Appellant's answering statement and nothing else. The award of the arbitrators, "in full settlement of all claims, submitted in *this arbitration*" [Tr. p. 113, emphasis supplied] shows the extent of the arbitration award and relates it to the dispute submitted by the parties.

The only controversy over which the arbitrators had jurisdiction was with regard to the sum "in excess of $6,000." The controversy was never changed by the parties; it was never increased by the parties.

With regard to the post-arbitration proceedings, the Appellee seeks comfort and repose in the form of the order signed by the Supreme Court, New York County [Tr. pp. 98, 99; and Tr. pp. 130, 131]. As we stated in our main brief, the only reason the Supreme Court signed the Appellee's order was that orders "should not contain any factual findings or decisional discussions." [See authorities at p. 18 of our main brief.] Nevertheless, now that the Appellee claims that the Appellant seeks to pervert the decision of the New York State Supreme Court, we answer it head-on. The Appellee's position and assertions in this regard are false. Since the Appellee has raised the question obtusely, let us look at the facts.

What did the Appellant submit to the Supreme Court, New York County on its motion to confirm? It used in addition to the notice of motion and certain exhibits the affidavit of one of its attorneys, Thomas A. Harnett [Tr. p. 114]. The affidavit reads in part as follows:

> "7. Pursuant to the aforementioned written agreement dated August 14, 1959, and Central's "Amended Demand for Arbitration" dated January 19, 1960, a copy of which is annexed hereto, made a part hereof and marked Exhibit A [See in particular pages 2 and 3 thereof Re "II. DEMAND FOR ARBITRA-

> TION.''], and pursuant to Albin's ''Answering Statement'' in reply to the ''Amended Demand for Arbitration,'' a copy of which is annexed hereto, made a part hereof and marked Exhibit B, *a single controversy, to wit, the sum, if any, in excess of $6,000 due and owing to Albin for work and services performed in the loading of the Despina C, was submitted to arbitration* by the Commercial Arbitration Tribunal, administered by the American Arbitration Association, 477 Madison Avenue, Borough of Manhattan, City and State of New York, under its rules and pursuant to the laws of the State of New York.'' [Emphasis supplied: entire notice of motion and affidavit attached and inserted in Appendix for clarity purposes only; cf. Tr. p. 126.]

The Appellee was apprised of the relief sought in the Supreme Court, New York County, thirteen days before the motion was returnable. The Appellee did not oppose the motion, nor contest the factual statements in the affidavit of Thomas A. Harnett, submitted in support of the motion in New York County, Supreme Court. [See decision of Supreme Court set forth in full in Appellant's affidavit in the District Court, Tr. 115; reported N. Y. L. J. Jan. 24, 1962, p. 12, col. 7.]

The sole motion before the Supreme Court in the State of New York was to confirm the award of a dispute relating to ''. . . a single controversy, to wit, the sum, if any, in excess of $6,000 . . . submitted to arbitration.'' [¶7 of Affidavit of Thomas A. Harnett, *supra;* Tr. p. 126.]

We do not make any concession as Appellee states at page 30 of its brief, but as at page 17 of our original brief and referred to at page 30 of Appellee's brief, we reaffirm that ''the moving papers submitted by the Appellant at the time of the motion fully apprised the New York Court of the position of the Appellant, which is the same here.'' [In its brief, Appellee put emphasis on the words ''which is the same here''.] From the affidavit which is contained in the Appendix of this brief, it is clear beyond peradventure of doubt that the Supreme Court in New York was told that there was a ''single controversy''. [¶7 of affidavit of

Thomas A. Harnett, *supra* and Appendix.] If the Appellee asserts the doctrine of *res judicata,* it binds appellee; it did not oppose the motion in the Supreme Court, New York County. The Appellee did not controvert the affidavit of Thomas A. Harnett there, nor did it oppose the relief the Appellant sought in its application for confirmation [Tr. 114, 115; N. Y. L. J., Jan. 24, 1962, p. 12, col. 7.]

Restatement of Appellant's Arguments.

The parties submitted but one dispute to the arbitrators, "The sum of $22,067.97 and each and every part thereof to the extent that said claim exceeds the sum of $6,000 . . . The said disputed claim of Albin Stevedore Company for sums in excess of $6,000 . . ." [Tr. pp. 86, 87].

Article 84 of the Civil Practice Act of the State of New York, and particularly Section 1462, limits the power of the arbitrators to those granted the arbitrators by the demand for arbitration. In the case at bar, neither the demand for arbitration [Tr. p. 38], the amended demand for arbitration [Tr. pp. 86-87], nor the answering statement [Tr. pp. 89-92] submitted any dispute other than the claim which "exceeds the sum of $6,000." We submit, these simple, precise facts sustain our conclusion.

For, under the principle of *contra proferentem,* the demand and amended demand for arbitration, both drawn by Appellee, must be strictly construed against it. *Taylor* v. *U. S. Casualty,* 269 N. Y. 360, 199 N. E. 620 (1936); *Marcus* v. *U. S. Casualty,* 249 N. Y. 21; 161 N. E. 571 (1928). If the Appellee desired to arbitrate the Appellant's entire claim, it could have used simple language to do so; it chose, however, simple language placing *only the excess of $6,000 in dispute.*

The plain meaning of the words "in excess of $6,000" does not include, by any stretch of the imagination, issues as to the sum of $6,000 which was concededly due the Appellant (there never was any dispute about it to be

arbitrated) nor did it permit the arbitrators thereunder to question the basic $6,000, i.e., the conceded amount due Appellant. The sole matter before the arbitrators was that "in excess of $6,000"; the arbitrators were powerless to include that $6,000 in their award. To do so would have been improper, and unfair to the Appellee. *William B. Logan & Associates* v. *Monogram Precision Industries,* 184 Cal. App. 2d 12; 7 Cal Rptr. (West's) 212 [set forth at pp. 13-15 of our main brief]; a situation that we would not countenance.

Apparently, it is the Appellee's contention, however, that the discussions relative to the sum of $6,000 concededly due Appellant at the arbitration hearing enlarged the jurisdiction of the arbitrators. This contention is without merit in fact or law and the cases referred to at page 25 of its brief do not sustain the conclusion appellee asserts.

Conclusion.

The demand for arbitration, i.e., "the sum of $22,067.97 and each and every part thereof to the extent that said claim exceeds the sum of $6,000" and "the said disputed claim of Albin Stevedore Company for sums in excess of $6,000" [Tr. pp. 86, 87] and the award of the arbitrators "in full settlement of all claims submitted to *this* arbitration [Tr. p. 95; emphasis supplied] fully sustains our position.

The Appellee's demand for arbitration and the Appellant's answering statement were the source and definition of the authority exercised by the arbitrators. *Matter of T. W. U.,* 187 Misc. 2d 247, 63 N. Y. S. 2d 17. The parties submitted but one dispute to the arbitrators, i.e., the excess over $6,000, the claim set forth in the second cause of action in the District Court suit. The arbitrators' award was solely "in full settlement of all claims submitted to *this arbitration.*" [Tr. p. 95; emphasis supplied] The submission to the arbitrators did not encompass the first cause of action; the right to dispose of that action remained

exclusively in the District Court. The District Court solely, and not the arbitrators had jurisdiction over the claim set forth in the first cause of action.

Therefore, in the absence of any question of fact as to the amount due under the first cause of action and in the light of the indisputable fact that the first cause of action was not before the arbitrators, this Court should reverse the District Court and enter an order granting Appellant's motion for summary judgment on the first cause of action and grant judgment in the sum of $6,000 with interest at 6 per cent from September 18, 1959, to date.

Respectfully submitted,

CLARKE, CLARKE, ALBERTSON & BOVINGDON
Attorneys for Appellant,
Albin Stevedore Company

GEORGE W. CLARKE,

JAMES B. DONOVAN,
THOMAS A. HARNETT,

(Both of the New York Bar),
Of Counsel.

APPENDIX

Notice of Motion in Supreme Court, New York County, and Supporting Affidavit of Thomas A. Harnett.

SUPREME COURT OF THE STATE OF NEW YORK,

County of New York.

In the Matter of the Application of Albin Stevedore Company to confirm the award made in the arbitration proceeding between Albin Stevedore Company and Central Rigging & Contracting Corp. under the arbitration clause of a written agreement dated August 14, 1959.	Index No. 97/61

Sirs:

Please take notice that upon the written award of all of the arbitrators in the above-entitled arbitration proceeding, dated and acknowledged the 23rd day of November, 1960, and delivered to and received by Watters & Donovan, the attorneys for Albin Stevedore Company at the office of said attorneys, 161 William Street, New York 38, New York, on the 28th day of November, 1960, and upon the annexed affidavit of Thomas A. Harnett, sworn to the 30th day of December, 1960, the Petitioner herein will move this Court at a Sepcial Term, Part I, thereof, to be held in and for the County of New York, at the County Courthouse, New York, New York, in the Borough of Manhattan, City of New York, on the 16th day of January, 1961, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order:

1. Pursuant to Section 1461 of the Civil Practice Act confirming the award of the arbitrators made by a majority thereof; and

2. Pursuant to Section 1464 of the Civil Practice Act directing judgment to be entered in conformity therewith; and

3. Granting such other and further relief as to the Court may seem just, together with the costs and disbursements of this proceeding.

PLEASE TAKE FURTHER NOTICE that pursuant to Rule 64 of the Rules of Civil Practice, you are hereby required to serve upon the undersigned answering affidavits and other papers, if any, which you intend to submit in opposition to this motion not less than five days before the return day thereof.

Dated: New York, New York
December 30, 1960.

Yours, etc.

WATTERS & DONOVAN
Attorneys for Petitioner,
Albin Stevedore Company
161 William Street
New York 38, New York

To:

KAISER & HOLZMAN, Esqs.
Attorneys for Central Rigging & Contracting Corp.
21 East 40th Street
New York 16, New York

SUPREME COURT OF THE STATE OF NEW YORK

County of New York

In the Matter

of the Application of

Albin Stevedore Company

to confirm the award made in the arbitration proceeding between Albin Stevedore Company and Central Rigging & Contracting Corp. under the arbitration clause of a written agreement dated August 14, 1959.

Thomas A. Harnett, being duly sworn, says:

1. I am an attorney and a member of the firm of Watters & Donovan, attorneys for Albin Stevedore Company, the Petitioner herein. I am familiar with all the proceedings herein.

2. Albin Stevedore Company, hereinafter called Albin, is a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

3. Central Rigging & Contracting Corp., hereinafter called Central, is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

4. On or about August 14, 1959, Albin and Central entered into a written agreement for the loading and lashing of a specified cargo on the *M. V. Despina C* at Ames Terminal, Seattle, Washington.

5. Paragraph 11 of the said written agreement contained the following provisions:

> "The parties hereto hereby incorporate by reference as though fully set forth herein all of Paragraphs 14, 15, 17, 20 and 22 of the underlying contract between Howard International and Central dated April 28, 1959. Except that where the said contractor is referred to in said underlying contract there is hereby substituted the word 'Albin' and wherever the word Howard is referred to is substituted the word 'Central'.

6. Paragraph 22 of the aforementioned "underlying contract between Howard International and Central dated April 28, 1959," contained the following provisions:

> *Arbitration:* Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration, in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered may be entered in any court for jurisdiction thereof. The arbitration shall be held in New York City, New York or in Seattle, Washington, at Howard's option."

7. Pursuant to the aforementioned written agreement dated August 14, 1959, and Central's "Amended Demand for Arbitration" dated January 19, 1960, a copy of which is annexed hereto, made a part hereof and marked Exhibit A [See in particular pages 2 and 3 thereof Re "II. Demand for Arbitration."], and pursuant to Albin's "Answering Statement" in reply to the "Amended Demand for Arbitration," a copy of which is annxed hereto, made a part hereof and marked Exhibit B, a single controversy, to wit, the sum, if any, in excess of $6,000 due and owing to Albin for work and services performed in the loading of the *Despina C,* was submitted to arbitration by the Commercial Arbitration Tribunal, administered by the American Arbitration Association, 477 Madison Avenue, Borough of Manhattan, City and State of New York, under its rules and pursuant to the laws of the State of New York.

8. Thereafter, pursuant to Section 12 of the Commercial Arbitration Rules of the American Arbitration Association, a copy of which is annexed hereto, made a part hereof, and marked Exhibit C, Messrs. Alvin A. Borgading, Frank D. Pillatt, Jr. and John E. Philly, were designated as arbitrators.

9. On October 19, 1960, at a time and place appointed, notice of which was given to both parties, the said three arbitrators heretofore named subscribed to their oath of office and proceeded to hear the proofs of the parties.

10. Said hearing was adjourned from time to time by consent of the parties.

11. All of said hearings were attended by both parties to this proceeding and by the aforesaid arbitrators.

12. The final hearing of said arbitration was held before the arbitrators on October 21, 1960, at which time both parties stated to the arbitrators that they had no further testimony to offer.

13. After the submission by both parties of supplemental memorandum, the hearings were declared closed on November 4, 1960.

14. On November 23, 1960, after the said arbitrators had completed their study of all the facts, circumstances, merits and the proofs entering into the controversy submitted to them as aforesaid, and after they had considered all of the evidence and arguments submitted by the parties to said arbitration agreement, all of said arbitrators having come to a decision, made an award in writing duly acknowledged and dated November 23, 1960.

15. The original of said award was duly filed in the office of the Tribunal Clerk of the American Arbitration Association on November 23, 1960, and a duplicate original

thereof was served on the attorneys for the parties herein in accordance with Section 44 of the Commercial Arbitration Rules of the American Arbitration Association (Exhibit C).

16. Annexed hereto, made a part hereof and marked Exhibit D is a true copy of the said award.

WHEREFORE, deponent respectfully prays that an order be made herein confirming said award and directing that judgment be entered in the Supreme Court of the State of New York, County of New York and that Albin Stevedore Company be allowed the costs of this motion to confirm and that Albin Stevedore Company have such other and further relief as to this Court would seem proper.

THOMAS A. HARNETT.

Sworn to before me this
30th day of December, 1960.

PATRICK J. HUGHES
Notary Public, State of New York
No. 03-7000350
Qualified in Nassau County
Cert. Filed in New York County
Term Expires March 30, 1962